No. 93-1911

In The

Supreme Court of the United States

October Term, 1994

CINDA SANDIN, *Unit Team Manager, Halawa Correctional Facility,*

Petitioner,

vs.

DeMONT R.D. CONNER, *et al.,*

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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I. Respondent Conner and His *Amici* Prove that the Interest in Avoiding Disciplinary Segregation in Hawaii's Prisons Does Not Give Rise to a "Liberty Interest" and Attendant Federal Litigation over the "Process Due," Regardless of Any "Mandatory" Language in the Hawaii Prison Regulations.

In our Brief (Pet. Br. 24-37), we establish, as a matter of policy, principle, and precedent, the basis for the rule requested by more than thirty States in *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989), and by thirty-seven states now: a "bright line" rule "that prison regulations, regardless of the mandatory character of their language, or the extent to which they limit official discretion, 'do not create an entitlement protected by the Due Process Clause when they do not affect the duration or release from confinement, or the very nature of confinement.' " *Id.* at 461 n.3. Nothing that either Respondent or his *amici* present in opposition to this prayer, on which this Court has expressly reserved judgment, *id.* at 462 n.3, takes anything away from our arguments in support.

A. Granting Petitioner's Prayer Will Leave Ample Federal and State Legal Protection Against Arbitrary Segregation, While Refusing that Prayer Discourages Progressive Penological Reforms in An Arena Where Federal Interests, Due to the Lack of Any Necessary Impact of Segregation Decisions on the Duration of Confinement, are at Their Ebb.

Inmate Conner and his *amici* labor long to prove what no one disputes, namely, that "[d]isciplinary punishment without constitutional check is not 'within the normal limits or range of custody which [a] conviction

has authorized the State to impose' " on an incarcerated felon. Resp. Br. at 40 (quoting *Meachum v. Fano*, 427 U.S. 215, 224 (1976)). For no one, and certainly not Petitioner, asserts the federal Constitution is wholly inapplicable to decisions to transfer an inmate to the Special Holding Unit, whether under the auspices of Hawaii's "adjustment process," or otherwise. As we state, "even without procedural Due Process protections, inmates would be entitled under Equal Protection analysis to treatment that meets minimum rationality, and, a fortiori, would be protected from assignment to segregation status on the basis of race, sex, national origin, religion, or alienage." Pet. Br. at 26 (footnotes omitted). Inmates likewise would be protected from disciplinary segregation that exceeds Eighth Amendment standards, or that constitutes retaliation for exercise of an inmate's limited but important First Amendment rights of free speech, free exercise of religion, or reasonable access to the courts. *Id.* at 25-26. No challenges to "untrammelled power" (ACLU Br. at 51) or to treatment of prisoners "in a lawless fashion" (Resp. Br. at 48) are raised by this case, and, if this Court rules for Petitioner, inmates will retain a panoply of remedies under the federal Constitution, as well as state court remedies that exist *if* our prison rules are "mandatory" as the Ninth Circuit held.

Ironically, as Conner and his *amici* all but concede, the judgment below creates enormous incentives for States to abandon the "salutary" array of rules that "channel the decisionmaking of prison officials." *Hewitt v. Helms*, 459 U.S. 460, 471 (1983). Lengthy lawsuits over whether particular rules create "liberty interests," and, if so, whether the "process due" was given in particular instances, are the sort of "burdensome and unwarranted"

procedures that may cause States to "abandon or curtail" progressive penological approaches. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 13 (1979).

As Conner agrees, under the Ninth Circuit's reasoning, any federal Due Process rights here were "created entirely by Hawaii law and may be modified by Hawaii" (Resp. Br. at 35). And, except for a groundless argument that assignment to disciplinary segregation automatically constitutes deprivation of a "liberty interest" under the force of the Due Process Clause standing alone – a claim this Court has emphatically rejected for over twenty years[1] – Respondent has no rejoinder to our contention

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[1] *See Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) ("the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison"); *Meachum v. Fano*, 427 U.S. 215, 229 (1976) ("the Due Process Clause does not impose a nationwide rule mandating transfer hearings"); *Montanye v. Haymes*, 427 U.S. 236, 242 (1976) ("We therefore disagree with the Court of Appeals' general proposition that the Due Process Clause by its own force requires hearings whenever prison authorities transfer a prisoner to another institution because of his breach of prison rules, at least where the transfer may be said to involve substantially burdensome consequences."); *see also Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976); *Hewitt v. Helms*, 459 U.S. at 468; *Olim v. Wakinekona*, 461 U.S. at 248; *Kentucky Department of Corrections v. Thompson*, 490 U.S. at 461. These cases effectively dispose of any arguments by Conner and his *amici* relying on doctrines applicable to pre-trial detention, and other deprivations visited upon persons not convicted of crime and not lawfully imprisoned under conditions that are "within the sentence imposed," *Montanye*, 427 U.S. at 242. *See* Resp. Br. at 39-48 (citing *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)). Also dispositive is that, under Hawaii law, disciplinary segregation *is not* punitive. "The disciplinary committee's objective is to maintain prison order and discipline," and not "to ascertain guilt or innocence, [or] to

that the decision of the Ninth Circuit below gives States good reasons to adopt mandatory assignments to segregated cells, *see* Pet. Br. 32, not only as the States seek to avoid procedural due process challenges to "individualized" segregation assignments, but as States try to carry out their duty to " 'take reasonable measures to guarantee the safety of the inmates.' " *See Farmer v. Brennan*, 114 S. Ct. 1970, 1976 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)).[2] Respondent's view thus not only frustrates the adjustment process's goal of "summarily maintaining prison order," *State v. Alvey*, 67 Haw. 49, 55, 678 P.2d 5, 9 (1984), but encourages a rigid "one man, one cell" rule, *cf. Bell v. Wolfish*, 441 U.S. 520, 542 (1979), that is antithetical to a flexible response to "the perplexing sociological problems of how best to achieve the goals of the penal function[.]" *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981). In an area where this Court has repeatedly granted prison officials "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security," *Bell*, 441

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punish offenders[.]" *See State v. Alvey*, 67 Haw. 49, 56, 678 P.2d 5, 9 (1984).

[2] The suggestion by Conner's *amici* that disciplinary segregation inflicts "cruel and unusual punishment" (*see* ACLU Br. at 18 n.6 and Mandel Legal Aid Br. at 46) is baseless. Prison rules for the SHU provide for all necessary amenities, J.A. 156-68, Pet. Br. App. 23a, and inmates are not even in "solitary confinement" in that they may speak with their neighbors and may even "yell" across the Unit so long as they do not "disturb[ ] the sleep and routine of fellow inmates." J.A. 207. The courts below rejected all substantive challenges to conditions of confinement, as Conner concedes. Resp. Br. 3 n.1.

U.S. at 547, Conner's prayer for extensive post-hoc federal procedural review creates an intolerable constitutional straightjacket, subjecting prison managers to claims under the Eighth Amendment for refusals to pursue costly disciplinary actions, and claims under Due Process doctrine when they undertake such actions even in clear cases.[3]

Recognizing this, Respondent and his *amici* make much of the fact that a Hawaii inmate's disciplinary record may affect a prisoner's chances for parole, insofar as "[p]arole may be denied to an inmate when the [Hawaii Paroling] Authority finds" "[t]he inmate has been a management or security problem in prison as evidenced by the inmate's misconduct record," Haw. Admin. R. § 23-700-33(b), Pet. Br. App. 44a. *See* Resp. Br. 33-34, ACLU Br. at 17-18. Thus, as Respondent puts it, "like the possible loss of good time credit in *Wolff [v. McDonnell*, 418 U.S. 539 (1974)]," a disciplinary finding "is serious enough to require due process safeguards." Resp. Br. at 34.

Aside from the fact that these arguments were raised nowhere below, and should be ignored for that reason, *see Whitley v. Albers*, 475 U.S. at 326 (citing *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977)), these claims not only prove too much, but mischaracterize Hawaii's separate procedures for imposition of disciplinary segregation and the granting of parole. Respondent and his *amici* concede that assignment to disciplinary

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[3] Here, Conner confessed to cursing at a guard and failing to cooperate in a strip search, within ear shot of other SHU inmates, Pet. App. A61-A62, A66, an area where "the 'ever-present potential for violent confrontation and conflagration' " is at its height. *Whitley v. Albers*, 475 U.S. 312, 321 (1986).

segregation cannot, of its own force, alter an inmate's minimum term, or deprive the inmate of parole. *See* Resp. Br. at 32-34, ACLU Br. at 17-18. Thus, in this context, an assignment to segregation at worst carries with it a potential defamatory statement that may be considered at a parole hearing. Such statements do not, as a general matter, give rise to "violation of a constitutional right at all," *Siegert v. Gilley*, 500 U.S 226, 232 (1991); *see id.* at 233 (discussing *Paul v. Davis*, 424 U.S. 693 (1976)), and if, as we urge, a mere transfer to disciplinary segregation is insufficient to create a "liberty interest," then, as this Court held in *Meachum v. Fano*, 427 U.S. 215, 229 n.8 (1976), the situation is not "substantially different because a record will be made of the transfer and the reasons which underlay it, thus perhaps affecting the future conditions of confinement, including the possibilities of parole." This is especially so in that the Supreme Court of Hawaii has authoritatively held that prison adjustment committee findings carry no collateral estoppel effect. *State v. Alvey*, 67 Haw. 49, 57, 678 P.2d 5, 10 (1984). Under comity principles, this Court "must give the agency's factfinding the same [non]preclusive effect," *Tennessee v. Elliott*, 478 U.S. 788, 799 (1986),[4] and the

[4] This non-preclusiveness is reinforced by the parole rules, which state only that a possible basis for denial of parole may lay in the conclusion of the Authority, after a hearing, that "[t]he inmate has been a management or security problem in prison as *evidenced* by the inmate's misconduct record." Haw. Admin. R. § 23-700-33(b) (emphasis added). The misconduct record, like the "written testimony" and "oral statements" of the prosecuting attorney and others who may appear at a parole hearing, is only "evidence," and can be rebutted at the time of the hearing, *id.* §§ 23-700-31(a), 23-700-35(c). *Amici*'s claims to the contrary (Mandel Legal Aid Br. 48) are improper naked "denigrations of

teachings of *Paul*, *Meachum*, and *Siegert* are in force: the decision to assign an inmate to disciplinary segregation is no different than any other asserted defamatory "evidence" in the parole record.[5]

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the procedural protections afforded by [state] law," *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987).

In addition, that the Paroling Authority rules also give power to deny parole if the inmate "has a pending prison misconduct" does not alter the analysis, for the very recency of the misconduct charge under this rule is significant irrespective of whether the inmate is innocent. Indeed, because no one suggests that there is a "liberty interest" in avoiding a mere misconduct *charge*, Respondent's logic fails on its own terms. Finally, the inmate, as noted *supra*, has the ability at his parole hearing to rebut the merits of any misconduct charge.

[5] Respondent's argument, given the totally discretionary nature of parole in Hawaii, would, moreover, have the absurd effect of creating a "liberty interest" in pre-parole prison actions, where the parole decision itself is not constrained by procedural Due Process protections. *See* Pet. Br. at 10 (comparing Hawaii rules with *Board of Pardons v. Allen*, 482 U.S. 369, 374 (1987)). Aside from violating the logic of *Paul*, *Meachum*, and *Siegert*, affirmance on this basis would conflict with *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (no liberty interest in classification review committee hearing's recommended decision where "the prison Administrator's discretion is completely unfettered"). In any event, even if adverse adjustment committee findings did implicate a "liberty interest" in parole, that would not mean that they implicated a "liberty interest" in "freedom from disciplinary segregation." Pet. App. A3. It is only the *latter* "liberty interest" that formed the basis of the Ninth Circuit's decision, and, at worst, the potential impact of an adjustment committee finding on parole means only that federal Due Process requirements ought to apply at the time when the inmate receives his parole hearing. This analysis also applies to Respondent's argument, raised first here, that his assignment to disciplinary segregation in 1987 affected his ability to obtain a "recommend[ed] possible reduction in the

In short, this case turns on whether this Court meant what it said in *Hewitt v. Helms*, 459 U.S. at 470, when it recognized that "regulations structuring the authority of prison administrators may warrant treatment, for purposes of creation of entitlements to 'liberty,' different from statutes and regulations in other areas." The "bright line" test outlined by the States in *Thompson*, and represented here, appropriately responds to this recognition, not only for the reasons above, but because any other rule necessarily implies that there is *no* "mandatory" prison regulation that can be written and executed immune from a costly and intrusive judge-made federal tax in the form of post-hoc procedural Due Process review. *See* Resp. Br. at 36 & n.24. As Petitioner has shown, disciplinary segregation at Halawa facility is nothing more than the aggregate of certain privileges and restrictions, which cannot be meaningfully distinguished for constitutional purposes from other sets of privileges and restrictions in other parts of the facility. *See* Pet. Br. at

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minimum term" under Haw. Rev. Stat. § 354D-11(b) (Supp. 1992). *See* Resp. Br. 30, 45 n.32. This claim is also meritless in that § 345D-11(b) was not enacted until 1990, *see* Act of July 9, 1990, 1990 Haw. Sess. L. 1050, almost three years after Conner completed the confinement at issue, and, in any event, Respondent has pointed to no "specific facts" in the record that would even genuinely raise an issue of fact as to whether he would have been entitled to participate in a work program had he not been placed in disciplinary segregation, or whether any "possible reduction" would have been recommended or granted. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990). In addition, although inmates assigned to the SHU "do not attend programs they are scheduled for" "when [they] move to the Special Holding Unit," an inmate can be "rescheduled for his programs" as early as "the next week[.]" *See* J.A. 306, 307.

5-9, 28. Federalization of *all* state mandatory prison regulations under the guise of Respondent's Grand Unified Theory of Due Process[6] is far beyond anything this Court's caselaw has contemplated, *see, e.g., Baxter v. Palmigiano*, 425 U.S. 308, 323 (1976), yet Respondent offers no principled manner for this Court, if it affirms the judgment below, to avoid that result. Resp. Br. at 42 n.28.

In the end, moreover, there is no reason to think that, if the Court reverses, States will repeal their "written rules regarding prison discipline and the penalties for infractions." *Hewitt*, 459 U.S. at 471. Petitioner concurs that imposing constraints on lower-level officials is wise practice, and that Hawaii's adjustment process, to the extent it contains "mandatory" requirements, implements a multi-tiered system of control that promotes "[t]he entire rehabilitative ethos[.]" Resp. Br. at 48. Such a system undeniably has a role "in maintaining the peace in prison," *id.* at 47, and for that reason will, if prison administrators are prudent in responding to the pressure of the Eighth Amendment, and, if this Court reverses, survive. In light of this fact, the judgment below simply frustrates "desirable experimentation" by the States, *Hewitt*, 459 U.S. at 471, and ignores "the delicate balance between state and federal courts," and should be overturned. *Albright v. Oliver*, 114 S. Ct. 807, 818-19 (1994) (Kennedy J., joined by Thomas, J., concurring).

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[6] *See Board of Education v. Grumet*, 114 S. Ct. 2481, 2495, 2498-99 (1994) (separate opinion of O'Connor, J.) ("It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular clause[,]" "[b]ut the same constitutional principle may operate very differently in different contexts.").

Respondent and his *amici* have no good answer to any of this, and accordingly the judgment below should be reversed.

B. Contrary to the Contentions of Respondent and His *Amici*, a Determination that Disciplinary Segregation Assignments Do Not Implicate a "Liberty Interest" Would Not Offend *Stare Decisis* Precepts; Indeed it Would Serve Them.

Castigating three-fourths of the States as counseling a "radical departure from precedent" (Resp. Br. at 38), that "would reverse" at least four plenary decisions of this Court (Mandel Legal Aid Br. at 33), "confuse prison administrators and prisoners, and in the process generate an explosion of litigation" (ACLU Br. at 51), Respondent and his *amici* invoke *stare decisis* as their ultimate defense of the judgment below.

The short answer here is that *Thompson* expressly left "for another day" "the proposal" of the States for a "bright line" rule that prison regulations " 'do not create an entitlement protected by the Due Process Clause when they do not affect the duration or release from confinement, or the very nature of confinement.' " 490 U.S. at 461-62 n.3. That express deferral hardly makes sense if *stare decisis* bars the argument.

Petitioner submits that, if it were necessary to obtain reversal, this Court's precedents should be modified or revisited. The rule of law advocated by Respondent leads to nonsensical results, distorts the States' incentives, has no principled limits, and ultimately works against the real-world interests of inmates themselves. Under Conner's own view of *stare decisis*, the circumstances for

changing the law are present. *See* Resp. Br. at 37-38 (quoting *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808-09 (1992)). *See also* Mandel Legal Aid Br. at 41-42.

But as we have shown (Pet. Br. at 27-31), no such large steps are required to reverse even on the broader grounds we assert. As we and our *amici* point out, at most this is a "prime occasion for invoking [this Court's] customary refusal to be bound by dicta," and its "customary skepticism towards per curiam dispositions that lack the reasoned consideration of a full opinion[.]" *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 391 (1994). As the Court recognized in *Hewitt*, 459 U.S. at 469, "[e]xcept to the extent that our summary affirmance in *Wright v. Enomoto*[, 434 U.S. 1052 (1978)], *supra*, may be to the contrary, we have never held that statutes and regulations governing daily operation of a prison system conferred any liberty interest in and of themselves,"[7] and, as a summary disposition, *Wright* is amenable to plenary revisitation without offending *stare decisis* simply by virtue of "adversary presentation." *Bancorp Mortgage Co.*, 115 S. Ct. at 391. *See also* Pet. Br. at 30-31 & n.17.[8] *Hewitt's* holding that Pennsylvania

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[7] *Hewitt* also disposes of contentions that *Hughes v. Rowe*, 449 U.S. 5 (1980) (per curiam), "essentially a pleading case," *see* 459 U.S. at 469 & n.5, is precedent for Respondent's view. *See also Haines v. Kerner*, 404 U.S. 519, 520 (1972) (also a "pleading case"). Likewise, the summary reversal in *Cox v. Cook*, 420 U.S. 734 (1975), hardly establishes the view of *Wolff* Conner (Resp. Br. at 32 n.21) and *amici* (ACLU Br. at 11) invoke.

[8] Respondent's contention that our broader theory for reversal "would also require the overruling of *Vitek v. Jones*[, 445 U.S 480 (1980)], and *Washington v. Harper*[, 494 U.S. 210 (1990)], Resp. Br. at 32 n.22, is groundless. Both cases involve "[c]ompelled treatment in the form of mandatory behavior

provided the "process due" renders its statements that the State had "created a protected liberty interest" *dicta* with regard to the argument deferred in *Thompson*. Neither Respondent nor his *amici* respond to this. Nor do they offer any explanation why this Court has repeatedly refused to enshrine into holding the *dicta* in footnote 19 of *Wolff v. McDonnell*. *See, e.g., Heck v. Humphrey*, 114 S. Ct. 2364, 2370 (1994); *Thompson*, 490 U.S. at 461; *Superintendent v. Hill*, 472 U.S. 445, 453 (1985); *Hewitt*, 459 U.S. at 460.

Wolff v. McDonnell, to be sure, stands for the proposition that where "the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited *only* for serious misbehavior," "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances[.]" 418 U.S. at 557 (emphasis added). Respondent cannot (*see* Resp. Br. at 32-34), point to such a legal predicate here, and the "real substance" test, as both we (Pet. Br. at 36), and the *amici* States (New Hampshire Br. at 27-28) point out, is well grounded, and requires reversal regardless of any "mandatory" Hawaii prison rules.

Indeed, if there is one precedent that stands as a beacon, it is *Paul v. Davis*, 424 U.S. 693 (1976). Ironically,

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modification programs" that "are qualitatively different from the punishment characteristically suffered by a person convicted of crime." *Vitek*, 445 U.S. at 493; *see Harper*, 494 U.S. at 222. For this reason, both *Vitek* and *Harper* fit comfortably within the broader theory for reversal here. *See Thompson*, 490 U.S. at 461 n.3. *Harper*, moreover, upheld Washington's procedures for the administration of antipsychotic medication, and is thus similar to *Hewitt* in terms of its precedential value.

Conner cites *Paul* in support of his " 'positivist definition of property and liberty,' " *see* Resp. Br. at 36 & n.23, failing to recognize that the decision in *Paul* denied the existence of a federally protected liberty interest based on "positivist" notions of the law of libel, on the now well-accepted understanding that the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." 424 U.S. at 701. *Paul* establishes, clearly and emphatically, that there are particular contexts where federalization of state-created interests is inappropriate. Efforts by States to create manageable systems for "summarily maintaining prison order," *State v. Alvey, supra*, are, as this Court suggested in *Hewitt*, 459 U.S. at 471, one such context. *Stare decisis*, rather than supporting affirmance, demands reversal.

II. Both Respondent Conner and His *Amici* Underscore the Narrower Grounds for Reversal Based on the Discretion of Hawaii Prison Officials and the Procedural Nature of the Burden of Proof Rule Relied Upon by the Ninth Circuit.

Though the Court plainly can reverse on our broader theory, our Brief presents narrower grounds for reversal, mindful of the preference not to " 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Wholly aside from the prudential considerations warranting indulgence of these alternative grounds, the attacks launched on them by Respondent and his *amici* fall flat under any reasoned analysis.

A. Respondent and *Amici's* Attack on Our Threshold view of *Thompson* and the Two-Way Mandatory Outcomes Test is Undermined by Their Own Precepts for Construing State Law.

Petitioner's first argument that even a "positivist" theory of "liberty interests" requires reversal rests on the following statement in *Thompson, supra,* characterizing the Reformatory Procedures Memorandum of the Kentucky Department of Corrections: "This language is not mandatory. Visitors *may* be excluded if they fall within one of the described categories, see n. 1, *supra,* but they need not be." 490 U.S. at 464 (emphasis in original). Fairly interpreted, this language supports the "two-way mandatory outcomes test" in this particular context, and that test compels reversal if, as all here concede, Hawaii's officials have discretion *not* to assign an inmate to disciplinary segregation even if there has been an admission of guilt or "substantial evidence" to "support" a disciplinary "charge." *See* Haw. Admin. R. § 17-201-18(b). Seen in context, the arguments against this ground for reversal are unconvincing.

Respondent and his *amici* rely on the language of *Thompson* which states that "[t]he overall effect of the regulations is not such that an inmate can reasonably form an objective expectation that a visit would necessarily be allowed absent the occurrence of one of the listed conditions" in the Memorandum. *Id.* at 465. *See* Resp. Br. at 24-26; ACLU Br. at 23-26. Those "listed conditions," however, were only subsets of the general mandate that, under Respondent's view, would have limited the Kentucky officials' discretion, in a manner that created an enforceable "liberty interest," to deny visits in

those cases where "[t]he visitor's presence in the institution would constitute a clear and probable danger to the safety and security of the institution." *See* 490 U.S. at 457 n.2. If Respondent's and his *amici's* principles for interpreting state regulations are correct (*see* Resp. Br. at 21-23; ACLU Br. at 34-44; Mandel Legal Aid Br. at 24-25), *Thompson* can be sensibly read *only* as adopting, in this limited context, a two-way mandatory outcomes test. Pet. Br. at 39. So read, *Thompson's* requirement that "a particular result is to be reached upon a finding that the substantive predicates are met," 490 U.S. at 464, compels reversal because Petitioner "may" but "need not" assign an inmate to segregation for misconduct. *See* Haw. Admin. R. § 17-201-19.

B. Hawaii Has No Rule that Requires an Admission of Misconduct or a Finding of Misconduct Based on "Substantial Evidence"; and A Rule that Segregation Must Rest on "More than Mere Silence" Does Not Create a "Liberty Interest."

Respondent's and his *amici's* opposition to reversal, however, is most unpersuasive in ignoring *Thompson's* admonition that "the mandatory language requirement is not an invitation to courts to search regulations for *any* imperative that might be found." 490 U.S. at 464 n.4. Thus, the fact that an admission of misconduct or the presence of "substantial evidence" of misconduct requires "[a] finding of guilt," Haw. Admin. R. § 17-201-18(b), does not require an "acquittal" if such predicates are not present. Respondent's contentions to the contrary (Resp. Br. 21) simply ignore the "overall effect" of the regulations as *Thompson* requires that "effect" to be evaluated. *See* 490 U.S. at 464-65 and Resp.

Br. at 24-25. In turn, the only issue[9] on this front is whether the requirement of "more than mere silence" in Haw. Admin. R. § 17-201-18(b), triggers a "liberty interest" under *Thompson* and "positivist" Due Process doctrine.

Amici's suggestion (ACLU Br. at 39), that a requirement of more than "mere silence" could trigger a "liberty interest" is plainly wrong. Not only does it violate the interpretive principles of *Thompson* itself, *compare* 490 U.S. at 457 n.2, *with id.* at 465, it is at odds with this Court's view of Hawaii's classification rules in *Olim*, where limitations on the warden's ability to "hold in abeyance" recommended decisions, *see* 461 U.S. at 242-43, did not prevent the Court from concluding that state officials were "completely unfettered" in their transfer decisions.

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[9] Amicus ACLU, and no other party, asserts that the Attorney General of Hawaii has "interpreted the regulation just as the Ninth Circuit interpreted it" (ACLU Br. at 36), but this is not so. Neither the Question Presented nor the framing of Hawaii's rule in the Petition for Certiorari concede the issue, and both are sufficiently open-ended as to permit us to advance the contention that "the burden of proof is not 'substantial evidence' " (ACLU Br. at 38). The issue is "fairly included" within the Question Presented, and in any event the Ninth Circuit committed plain error in reading § 17-201-18(b) as it did, especially insofar as the construction we offer, which all parties have been able to brief, provides a narrow ground for decision. *See* S. Ct. R. 24.1(a); *cf. Frisby v. Schultz*, 487 U.S 474, 483 (1988); *Ashwander v. TVA, supra.* Even if none of this is true, however, the proper reading of Hawaii's rule in light of *Thompson* is at a minimum "antecedent" and "ultimately dispositive of the present dispute," *Arcadia v. Ohio Power Co.*, 498 U.S 73, 77 (1990), was "passed upon" by the Ninth Circuit, and raises a question "of importance to the administration of federal law" in an area "of evolving definition and uncertainty." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. ___, ___ n.8 (1991).

Id. at 249. Moreover, because segregation of an inmate on evidence consisting of nothing more than "mere silence" would come perilously close to – if it did not in fact constitute – an unconstitutionally irrational assignment under Equal Protection doctrine, Hawaii's subscription to the "some evidence" standard does not give rise to a "liberty interest," in that the rule allows officials to " ' deny the requested relief for any constitutionally permissible reason.' " *Id.* (quoting *Board of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981) (Brennan, J., concurring)). The fact that affirmance would do violence to the requirement of minimum rationality is perhaps the most compelling reason why the judgment below is wrong.

C. The Warden's Discretion Separately Requires Reversal.

Relying on this Court's interpretation of a federal statute, Respondent assert's that the facility Administrator's power unilaterally, and at his sole "discretion," "to modify any committee findings or decisions[,]" Haw. Admin. R. § 17-201-20(b), is insufficient to defeat a claimed "liberty interest" here. Resp. Br. at 22-23 & n.14 (quoting *MCI Telecommunications v. AT&T*, 114 S. Ct. 2223, 2229 (1994)). Petitioner respectfully submits that the principles for interpreting federal regulatory statutes are inapplicable in this context, where deference to state officials is at its height, *see Bell*, 441 U.S. at 547, as this Court's decisions in *Thompson* and *Olim, supra*, demonstrate. Moreover, assignment of a prison inmate generally, and particularly one already assigned to Halawa facility, even from general population to disciplinary segregation falls well within *MCI's* definition of the term "modify."

There is ample "basis in the regulations, Hawaii law [and] common sense" for the conclusion that Hawaii's rule delegates to the most senior official far greater discretion than is given to subordinates, *compare State v. Alvey, supra, with Cleavinger v. Saxner,* 474 U.S. 193, 204 (1985), and the issue is not whether the warden was the decisionmaker who assigned Conner to segregation (ACLU Br. at 48), but whether the warden could have overriden an acquittal " 'for any constitutionally permissible reason.' " *Olim,* 461 U.S. at 249. For this reason, too, this Court should reverse.

D. Hawaii's Prison Regulations are Procedural Only.

Respondent and his *amici* do not dispute that "an expectation of receiving process is not, without more, a liberty interest," *Olim,* 461 U.S. at 250 n.12, but has no rebuttal to the claim that this rule ought to have counseled a different result below. Ultimately, Respondent's claim that "guilt must be demonstrated" (Resp Br. at 27), flies in the face of Hawaii law, which is emphatic that "[t]he disciplinary committee's objective is to maintain prison order and discipline," and not "to ascertain guilt or innocence." *State v. Alvey,* 67 Haw. at 56, 678 P.2d at 9. Thus, rather than ease federalism concerns (Resp. Br. at 35-36), Respondent's position is undercut by the very "positivist" theory (*id.*) that is central to his argument.

E. Separate Authority to Transfer to the Special Holding Unit Dispels Any Federal Claim to A "Liberty Interest."

Conner agrees "[t]his Court has previously found that Hawaii prison regulations do not limit the discretion

of prison officials to transfer a prisoner" (Resp. Br. at 28 n.17), and it is clear that abundant authority exists to place inmates in the SHU without any of the proof assertedly required for disciplinary segregation.[10] *See* Pet. Br. at 47-48. Although Conner does not dispute that his ability to avoid the SHU was never " 'securely and durably' " his, *Wallace v. Robinson,* 940 F.2d 243, 246 (7th Cir. 1991) (en banc), he complains that this ground for reversal (Pet. Br. 45-47) "lacks a coherent rationale" and would "lead to increased litigation and uncertainty." (Resp. Br. at 29-30). Yet, it is Conner's own theory that requires him to show a "legitimate claim of entitlement" to avoid segregation in the SHU, and, given the alternative routes to that housing assignment, and the lack of any "collateral consequence" other than a rebuttable libel, Conner's case plainly fails. Conner's own affidavit concedes conditions for inmates in the SHU were "virtually" "one and the same" regardless of how inmates were placed there, *see* J.A. 84, and, if all else fails, that requires reversal.

CONCLUSION

For the reasons above, in our Brief, and in that of the *amici* States, the judgment of the Court of Appeals should be reversed. Should the Court rule against Petitioner on the "liberty interest" issue, the Court should reverse the Ninth Circuit's denial of immunity under the "plain error" standard, or at a minimum, should vacate the judgment denying immunity and remand to the Court of

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[10] The Ninth Circuit's decision in *Schroeder v. McDonald,* ___ F.2d ___ (9th Cir. 1994), is based largely on reasoning similar to that under review here, and is the subject of a petition for rehearing and request for stay pending a decision in this case.

Appeals for further consideration in light of the grant of certiorari and the Court's opinion here.

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